

**INDONESIA – CERTAIN MEASURES AFFECTING THE
AUTOMOBILE INDUSTRY**

*Arbitration
under Article 21.3(c) of the
Understanding on Rules and Procedures
Governing the Settlement of Disputes*

Award of the Arbitrator
Christopher Beeby

I. Introduction

1. On 23 July 1998, the Dispute Settlement Body (the "DSB") adopted the Panel Report¹ in *Indonesia – Certain Measures Affecting the Automobile Industry*. With respect to the 1993 Programme², the Panel found that the local content requirements linked to certain sales tax benefits and customs duty benefits violate the provisions of Article 2 of the *Agreement on Trade-Related Investment Measures* (the "*TRIMs Agreement*") and that the sales tax discrimination aspects violate Article III:2 of the GATT 1994.³ With respect to the 1996 National Car Programme⁴, the Panel found, *inter alia*, that Indonesia had acted inconsistently with Article 2 of the *TRIMs Agreement* and Articles I and III:2 of the GATT 1994, and that the European Communities had demonstrated that Indonesia had caused serious prejudice to the interests of the European Communities within the meaning of Article 5(c) of the *Agreement on Subsidies and Countervailing Measures*.⁵ The Panel recommended "that the Dispute Settlement Body request Indonesia to bring its measures into conformity with its obligations under the WTO Agreement."⁶

2. In a communication dated 21 August 1998, Indonesia informed the DSB, pursuant to Article 21.3 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), that it would "fully comply" with the recommendations and rulings of the DSB adopted on 23 July 1998.⁷ Indonesia also stated its belief that measures taken by it on 21 January 1998 to repeal the February 1996 Programme constituted "appropriate implementation of the

¹Adopted 23 July 1998, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R.

²The Panel Report (paras. 2.4-2.14) lists the following as the measures comprising the 1993 Programme: Minister of Industry Decree No. 114/M/SK/6/1993, 9 June 1993 ("The Determination of Local Content Levels of Domestically Made Motor Vehicles or Components") ("Decree 114/1993"); Minister of Finance Decree No. 645/KMK.01/1993, 10 June 1993 ("The Relief of Import Duty on the Import of Certain Parts and Accessories of Motor Vehicles for the Purpose of Automotive Assembling and/or Manufacture") ("Decree 645/1993"); Minister of Finance Decree No. 647/KMK.04/1993, 10 June 1993 ("The Kinds and Types of Motor Vehicles Subject to Sales Tax on Luxury Goods") ("Decree 647/1993"); Minister of Finance Decree No. 223/KMK.01/1995, 23 May 1995 ("The Improvement of Decree of the Minister of Finance Number. 645/KMK.01/1993 on the Relief of Import Duty on Parts and Accessories of Motor Vehicles for the Purpose of Automotive Assembly and/or Manufacture") ("Decree 223/1995"); and Minister of Finance Decree No. 36/KMK.01/1997, 21 January 1997 ("The Granting of Import Duty Relief to Certain Parts and Accessories of Motor Vehicles for the Assembly and/or Manufacturing of Motor Vehicles") ("Decree 36/1997"). The parties confirmed that these were the measures at issue in this arbitration. I note that Decree 36/1997 declared "null and void" the Decrees 645/1993 and 223/1995.

³Panel Report, para. 15.1(a) and (b).

⁴For a description of the measures comprising the 1996 National Car Programme – consisting of the February 1996 Programme and the June 1996 Programme -- see paras. 2.15-2.41 of the Panel Report. All parties agree that these measures are not at issue in this arbitration.

⁵Panel Report, para. 15.1(a)-(d).

⁶Panel Report, para. 15.4.

⁷WT/DS54/12, WT/DS55/11, WT/DS59/10, WT/DS64/9, 27 August 1998.

recommendations and rulings of the DSB" concerning the February 1996 Programme.⁸ With regard to the 1993 Programme, Indonesia stated the following:

... while intending to act expeditiously, Indonesia would require a reasonable period of time in which to examine all the options to meet its WTO obligations. In this context, Indonesia would require time until no later than 23 October 1999. ...⁹

3. On 21 September 1998, consultations were held pursuant to Article 21.3 of the DSU among Indonesia, the European Communities, Japan and the United States in order to reach agreement on a "reasonable period of time" for the implementation by Indonesia of the recommendations and rulings of the DSB adopted on 23 July 1998. These consultations and further written communications between the parties did not lead to an agreement. The European Communities requested, on 8 October 1998, that the "reasonable period of time" for implementation of the recommendations and rulings of the DSB in respect of the 1993 Programme be determined by binding arbitration pursuant to Article 21.3(c) of the DSU.¹⁰

4. By letter dated 21 October 1998, the parties informed the Director-General of the World Trade Organization (the "WTO") that they had agreed that I should act as arbitrator. The parties also agreed to extend the time-period provided for in Article 21.3(c) of the DSU for the binding arbitration for a period of 45 days to 7 December 1998. They agreed that my award would be deemed to be the award of the arbitrator for the purposes of Article 21.3(c) of the DSU in determining the reasonable period of time for Indonesia to implement the recommendations and rulings of the DSB. By letter dated 23 October 1998, the parties were informed that the Director-General had conveyed the agreement of the parties to appoint me as arbitrator, that I had accepted the appointment and that I would issue my award to the parties by 7 December 1998.

⁸WT/DS54/12, WT/DS55/11, WT/DS59/10, WT/DS64/9, 27 August 1998.

⁹*Ibid.*

¹⁰WT/DS55/12, WT/DS64/10, WT/DS54/13, WT/DS59/11, G/L/262, 13 October 1998.

5. In a letter sent by Japan to the Director-General on 23 October 1998, Japan clarified its position in this arbitration as follows:

The arbitration requested by the European Communities in its letter dated 8th October 1998 is concerning the reasonable period of time for the implementation of the recommendations and rulings on the so-called "1993 Programme". Since Japan requested the Panel to make rulings and recommendations on the "1996 Programme" only, Japan is not a party to the arbitration for the "1993 Programme". However, as Japan is still interested in this arbitration, it jointly signed the letter [of 21 October] to you in view of participating in the arbitration process.

6. Written submissions were received from Indonesia, the European Communities and the United States on 6 November 1998, and an oral hearing was held on 16 November 1998.

II. Arguments of the Parties

A. Indonesia

7. Indonesia asserts that 15 months, until no later than 23 October 1999, constitutes a reasonable period of time for implementation of the recommendations and rulings of the DSB in this case. Indonesia requests this period of time in order to assess fully the impact of changing the 1993 Programme on the industries concerned and to consider the various WTO-consistent policy options, as well as to provide a transitional period to allow the existing industries to make the necessary structural adjustments. By the end of January 1999 at the latest, a new policy is scheduled to be ready for issuance, and it will become effective by 23 October 1999. Indonesia requests the additional period of nine months after January 1999 as a transitional period to allow its existing industries to make the necessary structural adjustments. Indonesia makes it clear that the "impracticability" of complying immediately with the recommendations and rulings of the DSB stems not from any particularly complex or time-consuming legislative procedure, but rather from its current social and economic difficulties.

8. In the view of Indonesia, there are three principal factors that should be considered as "particular circumstances" to be taken into account in determining the reasonable period of time pursuant to Article 21.3(c) of the DSU in this case. First, the underlying domestic economic situation is severe. Indonesia states that its economy is near collapse, and that the economic slump has crippled businesses and industries and has pushed many heavily indebted companies into bankruptcy. Unemployment has reached unprecedented levels. The recommendations and rulings of the DSB must be implemented while the Government of Indonesia aims simultaneously to stabilize its

economy and preserve productive assets. The automotive industries are among those most severely affected by the economic and financial crisis.

9. Second, comprehensive deliberations are needed in order to bring the 1993 Programme into conformity with Indonesia's obligations under the *Marrakesh Agreement Establishing the World Trade Organization*¹¹ (the "*WTO Agreement*"). Unlike the 1996 National Car Programme that involved only one company, the 1993 Programme involves 190 labour-intensive companies/industries employing tens of thousands of Indonesian workers. The Government of Indonesia must prevent further unemployment and a deepening of the economic crisis by helping the companies to survive. The legislative procedures to bring the 1993 Programme into conformity with the recommendations and rulings of the DSB require a longer period than would be required for mere revocation of the measures found to be inconsistent with Indonesia's WTO obligations. WTO-consistent replacement measures are being considered. The Government of Indonesia has to conduct a comprehensive review of the measures at issue, focusing on alleviating possible negative impacts to the industries which might arise if the elements of subsidy under the 1993 Programme are abolished.

10. Third, a transitional period for adjustment is needed before the new policy becomes effective. As early as August 1998, the Government of Indonesia began conducting preliminary interdepartmental planning discussions to debate how best to bring the 1993 Programme into conformity with the recommendations and rulings of the DSB without deepening the economic crisis. Extensive meetings also have been held with the industry associations concerned, during which these associations maintained that they need a transition period in order for the automotive producers to make necessary structural adjustments to allow them to survive the changes.

11. Indonesia notes that the first paragraph of the preamble to the *WTO Agreement* stresses the importance of ensuring full employment in trade and economic endeavours. Indonesia's priority is to stem rising unemployment resulting from its economic and financial crisis in order to preserve social stability. In light of Article 21.7 of the DSU, Indonesia argues that the above factors constitute "particular circumstances" within the meaning of Article 21.3(c) of the DSU which make it impracticable for it to comply immediately with the rulings and recommendations of the DSB.

B. *European Communities*

12. The European Communities argues that the "reasonable period of time" for implementation of the recommendations and rulings of the DSB in this case is no more than six months from the date of

¹¹Done at Marrakesh, Morocco, 15 April 1994.

adoption of the Panel Report, i.e. by January 1999. In the view of the European Communities, Members are not automatically entitled to the 15-month period mentioned in Article 21.3(c) of the DSU. This is but a "guideline" for the arbitrator. An arbitrator should not accede to requests for 15 months unless the requesting Member demonstrates that it is not "practicable" to comply within a shorter period of time. The European Communities refers to the award of the arbitrator in *EC Measures Concerning Meat and Meat Products (Hormones)* ("*European Communities - Hormones*") for the proposition that the reasonable period of time "should be the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB."¹²

13. According to the European Communities, in determining what is reasonably "practicable", the arbitrator should consider exclusively:

- (i) the content of the required implementing measure. For example, drafting a technically complex measure such as a sanitary regulation may require more than a simple change of a tariff or tax rate; and
- (ii) the legal nature of the required implementing act, as well as the procedures which are necessary under the domestic law of the Member concerned in order to adopt that type of act. For example, for constitutional reasons, the amendment of an act of Parliament is generally more time-consuming than the amendment of an act of the Executive.

The European Communities asserts, on the other hand, that the political, economic or social consequences of the required implementing measures are not pertinent considerations which the arbitrator may take into account in order to determine the "reasonable period of time". Indeed, according to the European Communities, if such elements were to be taken into account, this would have the paradoxical result that those measures which are the most protectionist in effect could be maintained for the longest period of time after they have been declared inconsistent with a Member's WTO obligations.

14. The European Communities contends that the measures that have to be repealed or amended in order to implement the recommendations and rulings of the DSB are contained in Decree 36/1997

¹²WT/DS26/15, WT/DS48/13, 29 May 1998, para. 26.

and Government Regulation 50/1994.¹³ Both Decree 36/1997 and Government Regulation 50/1994 are acts of the Indonesian Executive, and not acts of the Indonesian Parliament. As such, they could be amended, repealed or replaced by acts of the same nature within a relatively brief period of time. Previous amendments of Decree 36/1997 and Government Regulation 50/1994 have been adopted and entered into force in much less than 15 months. Moreover, the "content" of the required implementing measures cannot be an excuse for delaying implementation for 15 months. In January 1998, within a period of a few weeks, Indonesia amended Decree 36/1997 and Government Regulation 50/1994 in order to abolish similar tax and tariff benefits provided for in the 1996 National Car Programme. There is no reason why the measures required for implementing the Panel's recommendations and rulings with regard to the 1993 Programme could not be adopted in an equally expeditious manner. In view of Indonesia's own acknowledgement that the implementing measures will be ready for issuance in early 1999 at the latest, there is no justification for delaying the implementation of the recommendations and rulings of the DSB beyond that date.

15. According to the European Communities, Indonesia's argument that a transitional period is needed should be rejected. The fact that certain manufacturers of motor vehicles and of parts and components for motor vehicles have benefited in the past from the measures condemned by the Panel cannot provide an excuse for continuing to afford protection to those manufacturers on a "transitional" basis.

C. *United States*

16. The United States submits that unless Indonesia presents a legally relevant justification as to why immediate implementation is "impracticable", the arbitrator should find that immediate implementation is not "impracticable" and that Indonesia should implement the recommendations and rulings of the DSB immediately. Should the arbitrator find that immediate implementation is impracticable, the arbitrator should find one month from the date of the arbitrator's award, i.e., January 1999, to be the "reasonable period of time".

17. According to the United States, it is clear from the text, context, object and purpose of the second sentence of Article 21.3 of the DSU that Indonesia is eligible for a "reasonable period of time" only if it first establishes that immediate compliance is impracticable. Indonesia has not established that immediate compliance is impracticable and has, in fact, demonstrated that immediate compliance is practicable. "Impracticable" means "incapable of being performed or accomplished by the means

¹³The European Communities refers to Government Regulation No. 50 of 1994 on the Implementation of Law No. 8 of 1983 on Value Added Tax on Goods and Services and Sales Tax on Luxury Goods, as amended.

employed or at command".¹⁴ The factors that would go into determining whether or not immediate compliance is "impracticable" are those relating to:

- (i) the legal form of implementation (e.g., legislation, regulation, decree, etc.);
- (ii) the period of time in which the implementing Member can achieve the proposed legal form of implementation, assuming that the Member applies itself in good faith; and
- (iii) the nature of the legislative or regulatory change to be made (e.g., making a simple change in a tariff rate, as compared to making more complex changes like the development of a new scientific standard).

Factors that are not relevant are the political instability, economic hardship, adjustment costs and social unrest that may be associated with implementation. These factors are inevitable whenever a government proposes to end its protection of a domestic industry, and, for that reason, should not be included in an objective assessment of whether immediate compliance is impracticable.

18. On this basis, the United States asserts that immediate compliance by Indonesia is not impracticable in this case. The measures making up the 1993 Programme take the form of ministerial decrees that can readily be revoked or revised by similar decrees without having to go through any complicated or time-consuming legislative process. In the consultations among the parties concerning the reasonable period of time, Indonesia stated that it could not repeal or revise the measures that comprise the 1993 Programme as expeditiously as it had done with respect to the 1996 National Car Programme because a revision of the 1993 Programme would "affect the entire automobile industry in Indonesia." However, inconvenience to the beneficiaries of a measure found to be inconsistent with the *WTO Agreement* is not a factor that should be considered in determining whether immediate compliance is impracticable. Moreover, even if such inconvenience were a factor, Indonesia has not demonstrated, as a factual matter, that there is any such inconvenience.

19. In the view of the United States, it is not enough for Indonesia to rely on its well-known economic problems as a basis for delaying compliance with its WTO obligations. Indonesia has not shown that the prolongation of its WTO-inconsistent 1993 Programme will improve its overall economic situation. Indeed, it is equally plausible that the prompt elimination of the distortions inherent in the 1993 Programme will improve Indonesia's economic situation.

¹⁴Written submission of the United States, para. 21. The United States cites *Webster's Third New International Dictionary* (1976).

D. *Japan*

20. While Japan understands the current economic difficulties in Indonesia that have severely affected its industries, it is not in a position specifically to express its view on the reasonable period of time for implementation in this case. Japan, however, draws attention to certain systemic issues. First, in accordance with Article 21.1 of the DSU, prompt compliance with recommendations or rulings of the DSB "is essential to ensure effective resolution of disputes to the benefit of all Members." Due attention should be paid to this provision and to the provisions of the DSU relating to the interests of developing country Members. Second, the 15-month period in Article 21.3(c) is a "guideline" and Members are not automatically entitled to it. Therefore, when the period for implementation is to be made shorter or longer through the arbitration process pursuant to Article 21.3(c) of the DSU, "particular circumstances" should be clearly indicated.

III. **Award**

21. Article 21.1 of the DSU states the general principle that "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members." Pursuant to Article 21.3 of the DSU: "If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so." Where the reasonable period of time is determined through binding arbitration pursuant to Article 21.3(c), that provision stipulates that:

... a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.¹⁵

I consider that my mandate in this arbitration relates *exclusively* to determining the "reasonable period of time" for implementation under Article 21.3(c) of the DSU.

22. Indonesia has indicated, both in its written submission and in statements made at the oral hearing, that it intends not simply to revoke its existing measures constituting the 1993 Programme that have been found by the Panel to be inconsistent with its obligations under the *WTO Agreement*, but also to design new measures that are consistent with its obligations under the *WTO Agreement*. Indonesia intends to do this by amending the existing measures governing the 1993 Programme.¹⁶

¹⁵DSU, Article 21.3(c).

¹⁶Written submission of Indonesia, p. 4.

Indonesia has stated that its domestic rule-making process -- including interdepartmental consultations and consultations with affected companies and industries -- has been underway since early August 1998, and that its new "policy" designed to implement the recommendations and rulings of the DSB will be "ready for issuance" by the end of January 1999.¹⁷ Indonesia has indicated that it requires six months from the date of adoption of the Panel Report to conduct the domestic rule-making process necessary to implement the recommendations and rulings of the DSB in this case. I agree with the Award of the Arbitrator in *European Communities – Hormones* that:

Read in context, it is clear that the reasonable period of time, as determined under Article 21.3(c), should be the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB.¹⁸

In my view, six months is the shortest period possible for Indonesia to complete its domestic rule-making process in order to implement the recommendations and rulings of the DSB.

23. Indonesia also requests an additional period of nine months following the issuance of its implementing measure (i.e., to 23 October 1999) as a "transition" period to allow the affected companies/industries to make structural adjustments. I do not view structural adjustments of Indonesia's affected industries as a "particular circumstance" which may be taken into account under Article 21.3(c) of the DSU.¹⁹ In virtually every case in which a measure has been found to be inconsistent with a Member's obligations under the GATT 1994 or any other covered agreement, and therefore, must be brought into conformity with that agreement, some degree of adjustment by the domestic industry of the Member concerned will be necessary. This will be the case regardless of whether the Member concerned is a developed or a developing country. Structural adjustment to the withdrawal or the modification of an inconsistent measure, therefore, is not a "particular circumstance" that can be taken into account in determining the reasonable period of time under Article 21.3(c).

¹⁷Written submission of Indonesia, p. 4.

¹⁸WT/DS26/15, WT/DS48/13, 29 May 1998, para. 26.

¹⁹I note that the Award of the Arbitrator in *Japan – Taxes on Alcoholic Beverages* WT/DS8/15, WT/DS10/15, WT/DS11/13, 14 February 1997 rejected the argument that adverse effects on producers (and consumers) of the products involved constitute "particular circumstances" that should be taken into account in determining the reasonable period of time under Article 21.3(c) of the DSU.

24. On the other hand, Indonesia is a developing country. In that context, I note that Article 21.2 of the DSU requires that:

Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.

Although the language of this provision is rather general and does not provide a great deal of guidance, it is a provision that forms part of the context for Article 21.3(c) of the DSU and which I believe is important to take into account here. Indonesia has indicated that in a "normal situation", a measure such as the one required to implement the recommendations and rulings of the DSB in this case would become effective on the date of issuance.²⁰ However, this is not a "normal situation". Indonesia is not only a developing country; it is a developing country that is currently in a dire economic and financial situation. Indonesia itself states that its economy is "near collapse".²¹ In these very particular circumstances, I consider it appropriate to give full weight to matters affecting the interests of Indonesia as a developing country pursuant to the provisions of Article 21.2 of the DSU. I, therefore, conclude that an additional period of six months over and above the six-month period required for the completion of Indonesia's domestic rule-making process constitutes a reasonable period of time for implementation of the recommendations and rulings of the DSB in this case.

25. In light of the above considerations, and pursuant to Article 21.3(c) of the DSU, I determine that the reasonable period of time for Indonesia to implement the recommendations and rulings of the DSB in this case is twelve months from the date of adoption of the Panel Report by the DSB, that is, twelve months from 23 July 1998.

²⁰Statement by Indonesia at the oral hearing.

²¹Written submission of Indonesia, p. 2.

Signed in the original at Geneva this 27th day of November 1998 by:

Christopher Beeby